Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

No. 75-1563

THOMAS W. AHLMAN, and
CAROL ANN AHLMAN, Husband and Wife - Plaintiffs

versus

CHRISTOPHER DURBIN
c/o Jefferson County Police Department
an Individual
JEFFERSON COUNTY COURT
Honorable Louis J. Hollenbach
Jefferson County Court House
JEFFERSON COUNTY FISCAL COURT
Comprised of
Honorable Louis J. Hollenbach
Judge, Jefferson County
c/o Jefferson County Court House
Honorable Maurice W. Archer
Commissioner
Louisville, Kentucky
c/o Jefferson County Court House
Honorable William H. Walden
Commissioner
Louisville, Kentucky
c/o Jefferson County Court House
and
JEFFERSON COUNTY POLICE MERIT BOARD
by and Through Its Members
Honorable J. Stanley Watson, Member
Honorable Shelton Weber, Member
Honorable John Fulton, Chairman Member
Honorable Charles Boone, Member
c/o Fiscal Court Building - - - - - Defendants

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

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Counsel for Plaintiffs

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SUPREME COURT OF THE UNITED STATES

No. _____

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Honorable J. Stanley Watson, Member
Honorable Shelton Weber, Member
Honorable John Fulton, Chairman
Member
Honorable Charles Boone, Member
c/o Fiscal Court Building - - - *Defendants*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

To: The Honorable, ~~The~~ Chief Justice and the Associate Justices of the Supreme Court of the ~~Commonwealth of Kentucky~~. UNITED STATES

The Petition of THOMAS W. AHLMAN and CAROL AHLMAN, husband and wife, for a writ of certiorari to review a judgment of the Supreme Court of Kentucky, made and entered by said Court on the 9th day of March, 1976, a copy of which is hereto appended, respectfully shows to this Court:

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the trial court. The per curiam opinion of the Court of Appeals of Kentucky has not been published officially. A copy of said opinion is appended hereto as Appendix One.

STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED

The date of the judgment sought to be reviewed and the date of its entry are the 8th day of October, 1973, a copy of which is appended as Appendix Two. A copy of the Civil Complaint is appended as Appendix Three.

No order has been granted for rehearing or for extension of time in which to petition for certiorari.

The statutory provision believed to confer on this Court jurisdiction to review the judgment of the Court below is 28 USC, 1257 (3).

QUESTION PRESENTED FOR REVIEW

May Jefferson County, a political subdivision of the Commonwealth of Kentucky, constitutionally assert a defense of sovereign immunity to the tort claim of Carol Ahlman, an innocent bystander, injured by a ricochet police bullet.

CONSTITUTIONAL PROVISIONS AND STATUTE WHICH THE CASE INVOLVES

The Fourteenth Amendment of the Constitution of the United States, which in pertinent part states; no state shall deny to any persons within its jurisdiction equal protection of the laws.

No provisions of the Kentucky Revised Statutes are in point here, as sovereign immunity is not a statutory provision, but a jurisprudential doctrine.

STATEMENT OF THE CASE

On August 9, 1969 Carol Ahlman, an innocent bystander, was leaving Hunt's Restaurant at Louisville, Kentucky and was in the entrance way of said restaurant when struck between the eyes by a ricochet bullet fired by officer Durbin, of the Jefferson County Kentucky Police Department. As a direct and proximate result thereof she was rendered industrially blind, and found by the United States Department of Health, Education, and Welfare, Social Security Administration, to be totally and permanently disabled.

At the time of the incident her husband, Thomas Ahlman, was serving in the United States Army in Vietnam, and joined in the action for loss of consortium.

STATE OF PROCEEDINGS IN WHICH FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

The Constitutional question was raised by oral argument in the Court of first instance, the Jefferson Circuit Court. The trial court entered a summary judgment against plaintiffs on the defense of sovereign immunity.

Upon appeal by the Ahlmans to the Court of Appeals of Kentucky (Now Supreme Court of Kentucky), Appellants in their Brief argued that the Judgment should be reversed because of the denial of equal protection of the laws of Kentucky, and the United States.

The parties extensively argued the issue of sovereign immunity in Kentucky on appeal.

ARGUMENT AMPLIFYING REASONS RELIEF ON FOR ALLOWANCE OF THE WRIT

This case presents questions of the first instance relating to the Constitutionality of the Kentucky jurisprudential doctrine, which has not been heretofore passed upon by this Court.

The case is of particular significant interest in that the political subdivision involved is the only political

subdivision of the Commonwealth of Kentucky that attempts to assert any claim of sovereign immunity.

The State of Kentucky has waived sovereign immunity for specified agencies of state government pursuant to Kentucky Revised Statute 44.070, and Kentucky municipalities are subject to general civil tort liability.

The County Government (of Jefferson County) is the only entity of State and Local Government which asserts a general immunity from tort actions.

The Ahlmans state that this so called immunity on its face and as applied is antagonistic to the equal protection and due process clauses of the Federal Constitution.

Moreover, the Jefferson County Government has waived sovereign immunity by the purchasing of automobile liability insurance and directing its carriers not to assert the defense of sovereign immunity in such civil actions.

A collateral question raised is whether or not the waiver of sovereign immunity by the Jefferson County government denied equal protection and due process to the Ahlmans in violation of the Fourteenth Amendment to the United States Constitution.

The Ahlmans state that they have been denied the equal protection of the law of Kentucky by the unlawful discrimination against them by bestowing of special treatment by Jefferson County on a class of automobile tort victims by refusing to assert its so called defense of sovereign immunity against those victims, but without stating a legitimate purpose, assert the said defense

against the Ahlman's tort claim, which is not automotive related. The Constitutional rights of the Ahlmans have been abrogated by the imposition of this ignominious doctrine on its face and as applied.

It is suggested that the Supreme Court of the United States is the final authority on the interpretation of the Federal Constitution on this question.

WHEREFORE, petitioners, pray that a writ of certiorari be issued out under the seal of this Court, directed to the Supreme Court of the Commonwealth of Kentucky, to the end that the judgment of the Supreme Court of Kentucky may be reviewed and reversed by this Honorable Court.

MARTIN F. SULLIVAN, JR.
1675 Story Avenue
Louisville, Ky. 40206
Counsel for Plaintiffs

APPENDIX

EXHIBIT No. 1

COMMONWEALTH OF KENTUCKY

OPINION RENDERED: FEBRUARY 6, 1976

[Seal]

SUPREME COURT OF KENTUCKY
File No. 73-997

THOMAS W. AHLMAN &
CAROL ANN AHLMAN, Husband & Wife

v.

CHRISTOPHER DURBIN, et al.

Appeal from Jefferson Circuit Court
Action No. 140597

MANDATE—Received March 11, 1976

The Court being sufficiently advised, delivered herein an opinion per curiam, and it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

(s) Martha Layne Collins
Clerk

A Copy—Attest:
Issued March 9, 1976 By_____, D.C.

SUPREME COURT OF KENTUCKY

RENDERED: FEBRUARY 6, 1976

73-997

THOMAS W. AHLMAN and
CAROL ANN AHLMAN, Husband and Wife - *Appellants*

v.

CHRISTOPHER DURBIN, ET AL. - - - *Appellees*

Appeal from Jefferson Circuit Court
Common Pleas Branch, Fifth Division
Honorable Raymond C. Stephenson, Judge
CR 140597

MEMORANDUM OPINION PER CURIAM—AFFIRMING

Ahlman appeals from summary judgment of the trial court dismissing complaint on the basis of sovereign immunity.

Ahlman was injured by a bullet fired by either a county police officer or a felon who was fleeing arrest at the time of an exchange of shots. Suit was filed against the individual police officer, the county, and various county officials in their official capacity. A motion for summary judgment was sustained as to all parties.

Officials of the county, acting in their official capacity, all fall within the protection afforded by the doctrine of sovereign immunity.

Cf. Cullinan v. Jefferson County, Ky., 418 S. W. 2d 407 (1967); Moores v. Fayette County, Ky., 418 S. W. 2d 412 (1967).

The issue of sovereign immunity extending to the police officer was not properly preserved for appellate review.

The judgment is affirmed.

All concur.

Attorney for Appellants:
MARTIN F. SULLIVAN, JR.
1675 Story Avenue
Louisville, Kentucky 40206

Attorneys for Appellees:
EUGENE MOSLEY
412 Kentucky Home Life Building
Louisville, Kentucky 40202

EXHIBIT No. 2

Notice-Motion-Order of Defendant for Summary Judgment, filed in Clerk's Office September 26, 1973, is as follows, to-wit:

To: Mr. Martin F. Sullivan, Jr.
1675 Story Avenue
Louisville, Kentucky 40206
Counsel for plaintiffs

Please take notice that on Monday, October 1, 1973, at 11 a.m. in the court room of the above Court, the defendants will make the motion and tender the order set out below.

CERTIFICATE

It is hereby certified that a copy hereof was on the 25th day of September, 1973, mailed to the person and address listed above.

MOTION

Come the defendants, by counsel, and move the Court to grant them a summary judgment pursuant to C.R. 56.03 of the Kentucky Rules of Civil Procedure on the grounds that there is no genuine issue as to any material fact and the movants are entitled to a summary judgment as a genuine law.

/s/ Eugene L. Mosley
Assistant County Attorney
1614 Kentucky Home Life Building
Louisville, Kentucky 40202
Counsel for Defendants

ORDER—Entered in Court October 8, 1973

On motion of the defendants, by counsel, and the Court being sufficiently advised,

It is Hereby Ordered and Adjudged that the defendants, and each of them, be granted a summary judgment in their favor and that the within action be dismissed at plaintiffs' cost.

/s/ Raymond C. Stephenson
Judge
10/8/73
Date

EXHIBIT No. 3

JEFFERSON CIRCUIT COURT

COMMON PLEAS BRANCH, FIFTH DIVISION

Thomas W. Ahlman, and
Carol Ann Ahlman, Husband and Wife - *Plaintiffs*

v.

Christopher Durbin
c/o Jefferson County Police Department
an Individual
Jefferson County Court
Honorable Louis J. Hollenbach
Jefferson County Court House
Jefferson County Fiscal Court
Comprised of
Honorable Louis J. Hollenbach
Judge, Jefferson County
c/o Jefferson County Court House
Honorable Maurice W. Archer
Commissioner
Louisville, Kentucky
c/o Jefferson County Court House
Honorable William H. Walden
Commissioner
Louisville, Kentucky
c/o Jefferson County Court House
and
Jefferson County Police Merit Board
by and Through Its Members
Honorable J. Stanley Watson, Member
Honorable Shelton Weber, Member
Honorable John Fulton, Chairman Member
Honorable Charles Boone, Member
c/o Fiscal Court Building - - - - *Defendants*

COMPLAINT

1. The plaintiffs herein, are residents of the Commonwealth of Kentucky and were residents of the Commonwealth of Kentucky at the time of the wrongs hereinafter complained of, except the plaintiff Thomas W. Ahlman was on active duty with the United States Army serving in Vietnam at the time of the wrongs hereinafter complained of.

2. All the wrongs hereinafter complained of occurred in Jefferson County, Kentucky within the jurisdiction of the captioned Court and that this Court has jurisdiction to hear and adjudicate the within cause.

3. Defendant, Honorable Louis J. Hollenbach, is sued herein as the Judge comprising Jefferson County Court and not as an individual.

4. Defendants, Honorable Louis J. Hollenbach, Honorable Thomas C. Helm, Honorable Maurice W. Archer, and Honorable William H. Walden, comprising the Jefferson County Fiscal Court are sued herein as the Jefferson County Fiscal Court and are not sued herein as individuals.

5. Defendants, Honorable J. Stanley Watson, Honorable Shelton Weber, Honorable John Fulton and Honorable Charles Boone, comprising the Jefferson County Police Merit Board are sued herein as the Jefferson County Police Merit Board and are not sued herein as individuals.

6. That on or about August 9, 1969, defendant, Christopher Durbin, then an employee of the Jefferson County Court and operating under the guidance and selection of the Jefferson County Court and by and through and with the approval of the Jefferson County Police Merit Board did wrongfully and negligently and without sufficient cause discharge a pistol, to wit, a Magnum revolver, and by reason of negligent operation and handling of said weapon, plaintiff, Carol Ann Ahlman, sustained a severe and traumatic bullet wound to her head which bullet wound has rendered her totally and permanently disabled, required extensive medical care, and the full extent of damages, are unknown at this time as she is still being treated medically.

7. That the Jefferson County Court was negligent in its selection of its employee, Christopher Durbin, and but for this negligence and the concurrent negligence of the Jefferson County Police Merit Board, the aforesaid grievous wrong to plaintiff, Carol Ann Ahlman, would not have happened.

8. That the Jefferson County Police Merit Board was negligent in its selection of Officer Christopher Durbin and negligent in maintaining him on the force and that but for this negligence the aforesaid wrongs would not have happened.

9. That the Jefferson County Court and Jefferson County Fiscal Court were negligent in that they failed to exercise proper supervision of the said employee Christopher Durbin by and through their employees and permitted Officer Durbin to use a privately owned, non issued revolver with ammunition that would not disintegrate upon hard surface impact and that there was available to defendant Durbin, Jefferson County Court and Jefferson County Fiscal Court and the Jefferson County Police Merit Board ammunition of a type that would disintegrate upon impact and that the failure to use this type of ammunition and the failure to supervise the issuance of police weaponry and proper disposition therein is actionable negligence and but for this negligence the wrongs to plaintiffs herein would not have occurred.

10. That by reason of the negligence aforesaid, plaintiff, Carol Ahlman, has sustained severe, grievous and permanent injuries the full extent of which are unknown at this time. That she has been rendered totally incapacitated

for any substantial gainfull employment and incurred numerous and adverse medical bills all to her damage in the sum of Three Hundred and Fifty Thousand Dollars, $350,000.00.

11. That her husband, Thomas Ahlman, joins in this petition and affirms all the allegations of negligence herein above contained and states that by reason of the negligence, he has been deprived of consortium and the loss of services of his wife in the amount of One Hundred Thousand Dollars, $100,000.00.

WHEREFORE, plaintiffs respectfully demand judgment against all the defendants hereinabove named and each of them in the sum Four Hundred and Fifty Thousand ($450,000.00) Dollars, interest at the rate of 7 per cent per annum from the date of judgment, for a trial by jury and for such other relief as the Court may deem proper in the premises.

/s/ DONALD L. SMALLEY
800 Kenyon Building
112 South Fifth Street
Louisville, Kentucky 40202
585-5828
Counsel for Plaintiffs

VERIFICATION OF COMPLAINT

Carol Ann Ahlman and Thomas Ahlman, being duly sworn, do hereby affirm that they have read and examined the foregoing COMPLAINT and that all of the allegations contained therein are true and correct to the best of their knowledge and belief.

/s/ CAROL ANN AHLMAN
Carol Ann Ahlman

/s/ THOMAS AHLMAN
Thomas Ahlman

STATE OF KENTUCKY
COUNTY OF JEFFERSON

I, Donald L. Smalley, a Notary Public for Jefferson County do hereby certify that the foregoing instrument was this day produced before me by Carol Ann and Thomas Ahlman who duly acknowledged the same to be their voluntary act and deed.

/s/ DONALD L. SMALLEY

Date 7-10-70
My Commission expires: October 30, 1970

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1563

MAY 27 1976

THOMAS W. AHLMAN, and
CAROL ANN AHLMAN, Husband and Wife - Petitioners

versus

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and
JEFFERSON COUNTY POLICE MERIT BOARD
by and Through Its Members
Honorable J. Stanley Watson, Member
Honorable Shelton Weber, Member
Honorable John Fulton, Chairman Member
Honorable Charles Boone, Member
c/o Fiscal Court Building - - - - Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

BRIEF OF RESPONDENTS IN OPPOSITION

(See inside cover for attorneys)

WESTERFIELD-BONTE CO., [illegible] W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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Attorneys for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1563

THOMAS W. AHLMAN, and
CAROL ANN AHLMAN, Husband and Wife - *Petitioners*

v.

CHRISTOPHER DURBIN
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JEFFERSON COUNTY COURT
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Honorable J. Stanley Watson, Member
Honorable Shelton Weber, Member
Honorable John Fulton, Chairman
Member
Honorable Charles Boone, Member
c/o Fiscal Court Building - - *Respondents*

(Caption continued)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

BRIEF OF RESPONDENTS IN OPPOSITION

May it please the Court:

QUESTION PRESENTED

Must the ancient doctrine of sovereign immunity be abrogated and Section 231 of the Kentucky Constitution be declared inoperative by this Court?

CONSTITUTIONAL PROVISION INVOLVED

Kentucky Constitution, Section 231

"The general assembly may, by law, direct in which manner and in what courts suits may be brought against the Commonwealth."

COUNTERSTATEMENT OF THE CASE

On August 9, 1969, at approximately 8:30 p.m., Officer Christopher Durbin was parked in his patrol car in a parking lot at Southside Drive and National Turnpike in Jefferson County, Kentucky. According to all the evidence presented, Officer Durbin, in pursuit of an escaping felon, was fired upon by the felon and returned fire with one shot.

The Petitioner, Carol Ann Ahlman, was apparently struck by one of the two shots fired in the exchange, but there was no direct proof as to who fired the shot injuring Petitioner.

REASON WHY THE WRIT SHOULD NOT BE GRANTED

The state and Federal Courts of the United States have long accepted and supported the doctrine of sovereign immunity. As this Court recognized in *Cohens* v. *Virginia,* 6 Wheat 264, 5 L. Ed. 257, a state cannot be sued without its consent. This doctrine was expressly incorporated in the Constitution of the United States by the adoption of the Eleventh Amendment in 1798.

The doctrine of sovereign immunity in Kentucky has existed from the beginning of the Commonwealth. Each of the four State Constitutions embodied this principle with minor variations, up to and including the present Section 231 of the 1891 Kentucky Constitution. The Kentucky Courts have continuously upheld the sovereign immunity of counties in a long line of cases. The presently controlling case in Kentucky is *Cullinan* v. *Jefferson County,* Ky., 418 S. W. 2d 407 (1967) which makes clear that a county is a political subdivision of the Commonwealth and is clothed with sovereign immunity.

The Respondents submit that under the considerations governing review on certiorari that are set forth in Rule 19 this Court is compelled to deny the petition. The Petitioners have advanced no "special and important reasons" justifying exercise of this Court's discretionary jurisdiction on certiorari. Even if this is a federal question of substance the decision of the Kentucky Supreme Court is consistent with decisions

of this Court on sovereign immunity. As was stated in *Palmer* v. *Ohio,* 248 U. S. 32, 39 S. Ct. 16, 63 L. Ed. 108 (1918) the right of individuals to sue the state in either a Federal or a state court cannot be derived from the Constitution or laws of the United States, but only from the consent of the state. The Kentucky Constitution properly invokes the doctrine of sovereign immunity, granting to the General Assembly the power to abrogate the doctrine in a manner it finds appropriate. The circumstances before us simply fall outside any area of exception.

As to the collateral contention that the County's purchase of automobile liability insurance serves to deny Petitioners equal protection of the laws, let us point out that the sovereignty may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever justice to the public requires it. *Beers use of Platenius* v. *Arkansas,* 20 How 527, 15 L. Ed. 991 (1858). Unless sovereign immunity is to become an "all or nothing" proposition, the power to accept or reject suit in its own courts must remain with the States' elected representatives.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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Eugene H. Mosley
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